Office-Supreme Court, U.S.
FILED
JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1045

IN THE

Supreme Court of the United States

October Term, 1980

JACKSONVILLE BULK TERMINALS, INC., HOOKER CHEMICAL CORPORATION, and OCCIDENTAL PETROLEUM CORPORATION,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

THOMAS W. GLEASON
Attorney for Respondents
One State Street Plaza
New York, N.Y. 10004
(212) 425-3240

Of Counsel:

ERNEST L. MATHEWS, JR.
CHARLES R. GOLDBURG

Questions Presented

1. Whether a suit by an employer under section 301 of the Labor Management Relations Act to enforce the no-strike clause of a collective bargaining agreement is a "case involving or growing out of [a] labor dispute" within the meaning of Section 4 of the Norris-LaGuardia Act?

2. Whether a federal court has jurisdiction to enjoin a work stoppage prior to arbitration where the matter over which the union is striking is not subject to the grievance and arbitration clause of the collective bargaining agreement?

TABLE OF CONTENTS

PAGE

Introduction 1

Statement of the Case 2

Summary of Argument 6

ARGUMENT:

I. This Case Involves a Labor Dispute Within the Meaning of the Norris-LaGuardia Act 8

A. An Action to Enforce a No-Strike Clause in a Collective Bargaining Agreement Involves a Labor Dispute 8

B. Petitioners' Arguments for the Inapplicability of Norris-LaGuardia Are Without Merit 10

II. The *Boys Markets* Exception to the Norris-LaGuardia Act Does Not Apply to This Case 14

A. Under *Buffalo Forge* a Court May Not Issue a Pre-arbitration Injunction Unless the Strike Is Over an Arbitrable Dispute 14

B. The Court of Appeals Correctly Held That *Buffalo Forge* Applies to This Case 17

C. The Underlying Dispute in This Case Is Not Over "Management Rights" 20

D. The Underlying Dispute in This Case Is Not Over "Work Assignment" 21

E. The Underlying Dispute Here Is With the Soviets 25

F. Petitioners and the Solicitor General Urge the Position of the Dissent in *Buffalo Forge* 27

PAGE

III. Policy Considerations Do Not Warrant Reversal of the Fifth Circuit's Decision 29

A. There Is No Federal Policy Prohibiting Political Strikes 29

B. The Decision Below Furthers the Federal Policy Favoring Arbitration of Labor Disputes 31

C. Petitioners Do Not Lack Alternative Remedies 32

D. Respondents Have Not Interfered With United States Foreign Policy 33

CONCLUSION 35

APPENDIX A1

TABLE OF AUTHORITIES

Cases: PAGE

Allied International, Inc. v. *International Longshoremen's Association*, 492 F. Supp. 334 (D. Mass. 1980), *rev'd*, 640 F.2d 1368 (1st Cir. 1981), *petition for cert. filed*, 49 U.S.L.W. 3763 (April 3, 1981) (No. 80-1663) 3n, 4n, 18n, 27, 30n

American Communications Association v. *Douds*, 339 U.S. 382 (1950) 30n

Armco Steel Corp. v. *United Mine Workers*, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975) 14n

Auto Workers Local 174 v. *NLRB*, 106 LRRM 2561 (D.C. Cir. March 3, 1981) 30n

Baldovin v. *International Longshoremen's Association*, Civil Action No. H-80-259 (S.D. Tex. Feb. 15, 1980); *aff'd*, 626 F.2d 445 (5th Cir. 1980) 3n, 4, 4n, 21, 27, 32

Boys Markets Inc. v. *Retail Clerks Union*, 398 U.S. 235 (1970) .....*passim*

Buffalo Forge Co. v. *United Steelworkers*, 428 U.S. 397 (1976) .....*passim*

Carolina Shipping Company v. *Local Union 1422, International Longshoremen's Association*, Civil Action No. 80-0873-1 (D. S.C. May 7, 1980) (unreported) 3n

Cedar Coal Co. v. *United Mineworkers*, 560 F.2d 1153 (4th Cir. 1977) 17n

Corporate Printing Co. v. *New York Typographical Union Number 6*, 555 F.2d 18 (2d Cir. 1977) 17n

Delaware Coca-Cola Bottling Co. v. *General Teamster Local Union 326*, 624 F.2d 1182 (3d Cir. 1980) 32n

Eastex v. *NLRB*, 437 U.S. 556 (1978) 30n

Hampton Roads Shipping Association v. *International Longshoremen's Association*, 631 F.2d 282 (4th Cir. 1980), *petition for cert. filed* (No. 80-1058) .....*passim*

PAGE

Harrington & Co. v. *International Longshoremen's Association*, 356 F. Supp. 1079 (S.D. Fla. 1973) 13
Henry v. *First National Bank*, 595 F.2d 291 (5th Cir. 1979) 29n

International Longshoremen's Association (Allied Int'l Inc.), Case No. 1-CC-1753 ..... 3n
International Longshoremen's Association (Occidental Chemical Company), Cases No. 10-CC-1141-1, -2, -3 & 4 ..... 3n
International Longshoremen's Association (Kansas Farm Bureau), Cases No. 23-CC-764-1, -2, -3 & 4 ..... 3n
Iowa Beef Processors, Inc. v. *Amalgamated Meat Cutters*, 597 F.2d 1138 (8th Cir.), *cert. denied, Amalgamated Meatcutters* v. *Iowa Beef Processors, Inc.*, 444 U.S. 480 (1979) 32n

J.A. Jones Construction Co. v. *Plumbers and Pipefitters Local 598*, 568 F.2d 1292 (9th Cir. 1978) 17n
Jacksonville Maritime Association, Inc. v. *International Longshoremen's Association, AFL-CIO*, 571 F.2d 319 (5th Cir. 1978) 17n
John W. McGrath Corp. v. *Atlantic Coast District, International Longshoremen's Association*, 80-CV-150 (N.D.N.Y. Mar. 6, 1980) 3n, 4n, 10, 14n, 18n, 26

Khedival Line v. *Seafarers' International Union*, 278 F.2d 49 (2d Cir. 1960) 12-13
Latrobe Steel Co. v. *United Steelworkers*, 545 F.2d 1336 (3d Cir. 1976) 17n

Mack v. *International Longshoremen's Association*, CV 480-051 (S.D. Ga. Feb. 22, 1980), *rev'd, sub nom. Baldovin* v. *International Longshoremen's Association*, 626 F.2d 445 (5th Cir. 1980) 3n, 27

PAGE

Marine Cooks & Stewards v. *Panama SS Co.*, 362 U.S. 365 (1960) 8
Missouri v. *National Organization For Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980) 29n

NLRB v. *C.K. Smith & Co., Inc.*, 569 F.2d 162 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978) 17n, 32n
NLRB v. *International Longshoremen's Association*, 332 F.2d 992 (4th Cir. 1964) 13
NLRB v. *Keller-Crescent Co.*, 538 F.2d 1291 (7th Cir. 1976) 17n
National Rejectors Industries v. *United Steelworkers*, 562 F.2d 1069 (8th Cir. 1977) 17n
New Negro Alliance v. *Sanitary Grocery Co.*, 303 U.S. 552 (1937) 9
New Orleans Steamship Association v. *International Longshoremen's Association*, 486 F. Supp. 409 (E.D. La. 1980), *aff'd in part and vacated and remanded in part*, 626 F.2d 455 (5th Cir. 1980) .....*passim*

Pacemaker Yacht Co., 253 N.L.R.B. 95 (1980) 32n

Sinclair Refining Co. v. *Atkinson*, 370 U.S. 195 (1962) 11, 28
Steelworkers v. *Enterprise Corp.*, 363 U.S. 593 (1960) .. 14n

United States Steel Corp. v. *United Mineworkers*, 519 F.2d 1236 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976) 13, 13n, 14n, 18n
United States v. *Brown*, 381 U.S. 437 (1965) 30n
United States v. *Hutchison*, 312 U.S. 219 (1941) 8
United States v. *Seeger*, 380 U.S. 163 (1965) 4n
United Steelworkers v. *Fort Pitt Steel Casting*, 635 F.2d 1071 (3d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3727 (March 16, 1981) 32n

PAGE

Walker Bros. Stone Co. v. *United Steelworkers, AFL-CIO*, 620 F.2d 132 (6th Cir. 1980) 17n

Walsh v. *International Longshoremen's Association*, 488 F. Supp. 524 (D. Mass. 1980), *vacated and remanded with instructions to dismiss on grounds of res judicata*, 630 F.2d 864 (1st Cir. 1980) 3n, 4n, 27

West Gulf Maritime Association v. *International Longshoremen's Association*, 413 F. Supp. 372 (S.D. Tex. 1975), *aff'd without opinion*, 531 F.2d 574 (5th Cir. 1976) 13

United States Constitution:

First Amendment 30

Statutes:

29 U.S.C. § 104 ..... 5, 8

29 U.S.C. § 104(a) 8n

29 U.S.C. § 113(c) 8n

29 U.S.C. § 157 ..... 30n

29 U.S.C. § 158(b) 30n

29 U.S.C. § 158(b)(4) 3n

29 U.S.C. § 160 ..... 11n

29 U.S.C. § 160(*l*) 3n

29 U.S.C. § 178(b) 11n

29 U.S.C. § 185 ..... 3n

29 U.S.C. § 186(e) 11n

29 U.S.C. § 187 .....3n, 27

Miscellaneous: PAGE

Conference Committee Report, Labor Management Relations Bill, 1947, H.R. 302, 80th Cong., 1st Sess. June 3, 1947 11

Sen. Rep. No. 105, 80th Cong., 1st Sess. 1947 .....11, 11n

Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialists Republics On The Supply of Grain, October 20, 1975, 26 U.S.T. 2972 ..... 34n

No. 80-1045

IN THE

Supreme Court of the United States

October Term, 1980

JACKSONVILLE BULK TERMINALS, INC., HOOKER CHEMICAL CORPORATION, and OCCIDENTAL PETROLEUM CORPORATION,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

Introduction

Respondents submit this brief, pursuant to Rules 34(2) and 35(2) of the Rules of this Court in response to the briefs filed by petitioners and by the Solicitor General as amicus curiae.[1]

---

[1] References to the Appendices to the Petition for Certiorari herein are designated: "—— a"; to the Joint Appendix: "J.A. at ——"; to the appendix to respondents' brief: "App. at ——"; to petitioners' brief: "Pet. at ——" and to the brief of the Solicitor General: "Amicus at ——."

Statement of the Case

The decision of the United States Court of Appeals for the Fifth Circuit for which review has been granted is reported *sub nom. New Orleans Steamship Association* v. *General Longshore Workers, ILA*, at 626 F.2d 455 (5th Cir. 1980) and is reproduced at 1a *et seq.* The Fifth Circuit reversed the decision of the District Court for the Middle District of Florida, Jacksonville Division, and vacated a preliminary injunction which had enjoined respondents prior to arbitration from refusing to load cargo destined for the Soviet Union. 29a *et seq.*

In response to the invasion of Afghanistan by the U.S.S.R., Respondent, International Longshoremen's Association, AFL-CIO ("ILA") adopted a resolution[2] that its

---

[2] The resolution was announced by ILA President Thomas W. Gleason on January 9, 1980, in the following statement:

"In response to overwhelming demands by the rank and file members of the Union, the leadership of the ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.

"This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.

"The reason for this action should be apparent in light of international events that have affected relations between the U.S. & Soviet Union.

"However, the decision by the Union leadership was made necessary by the demands of the workers.

"It is their will to refuse to work Russian vessels and Russian cargoes under present conditions of the world.

"People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs."

By telegrams dated April 24, 1981 and June 5, 1981 the ILA has recommended to its members that they resume handling goods to and from Russia.

members would not handle any cargo bound to or coming from the Soviet Union or carried on Russian ships. The resolution was inspired by the overwhelming sentiment of the rank and file longshore union members. The refusal to handle covered all ports on the East and Gulf coasts.[3] It

---

[3] The ILA's response to the invasion of Afghanistan has given rise to several cases in addition to the case at bar. The following actions were commenced under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185: *New Orleans Steamship Ass'n* v. *International Longshoremen's Ass'n*, 486 F. Supp. 409 (E.D. La. 1980), *aff'd in part and vacated and remanded in part*, 626 F.2d 455 (5th Cir. 1980); *Hampton Roads Shipping Ass'n* v. *International Longshoremen's Ass'n*, 631 F.2d 282 (4th Cir. 1980), *petition for cert. filed*, (No. 80-1058); *John W. McGrath Corp.* v. *Atlantic Coast District, International Longshoremen's Ass'n*, 80-CV-150 (N.D.N.Y. Mar. 6, 1980). (This unreported opinion is reproduced as an appendix to this brief. App. at 1 *et seq.*). *Carolina Shipping Company* v. *Local Union 1422, International Longshoremen's Ass'n*, Civil Action No. 80-0873-1 (D. S.C. May 7, 1980) (unreported).

The following proceedings were brought for preliminary injunctions under § 10(*l*) of the LMRA, 29 U.S.C. § 160(*l*), by various Regional Directors of the National Labor Relations Board: *Baldovin* v. *International Longshoremen's Ass'n*, Civil Action No. H-80-259 (S.D. Tex. Feb. 15, 1980); *aff'd*, 626 F.2d 445 (5th Cir. 1980); *Mack* v. *International Longshoremen's Ass'n*, CV 480-051 (S.D. Ga. Feb. 22, 1980), *rev'd, sub nom. Baldovin* v. *International Longshoremen's Ass'n*, 626 F.2d 445 (5th Cir. 1980); *Walsh* v. *International Longshoremen's Ass'n*, 488 F. Supp. 524 (D. Mass. 1980), *vacated and remanded with instructions to dismiss on grounds of res judicata*, 630 F.2d 864 (1st Cir. 1980).

The following private action for damages under LMRA § 303, 29 U.S.C. § 187, the antitrust laws, and admiralty tort, was commenced: *Allied International, Inc.* v. *International Longshoremen's Ass'n*, 492 F. Supp. 334 (D. Mass. 1980) *rev'd*, 640 F.2d 1368 (1st Cir. 1981), *petition for cert. filed*, 49 U.S.L.W. 3763 (April 3, 1981) (No. 80-1663).

In addition, unfair labor practice charges for violation of the secondary boycott proscriptions of LMRA § 8(b)(4), 29 U.S.C. 158(b)(4), are presently pending before the NLRB in: *International Longshoremen's Ass'n (Allied Int'l Inc.)* Case No. 1-CC-1753; *International Longshoremen's Ass'n (Occidental Chemical Company)* Cases No. 10-CC-1141-1, -2, -3 & 4; and *International Longshoremen's Ass'n (Kansas Farm Bureau)* Cases No. 23-CC-764-1 -2, -3 & 4.

was directed exclusively against Soviet goods and ships. It did not spring from any dispute with ILA employers or their customers, whom union members continued to service as usual except with respect to Soviet trade. No coercive or retaliatory action was taken against ILA employers or other firms which continued to do business with the Soviets.

The union action vis-à-vis the U.S.S.R. had a dual aspect. It was a public manifestation of the ILA's disapproval of the Soviet invasion of Afghanistan and at the same time a decision in conscience by longshoremen to abstain from dealing with the aggressor nation out of sympathy for its victims. The Fifth Circuit recognized this two-fold aspect:

> [T]he union's desire to voice a political protest *and* to avoid giving aid and comfort to a nation whose policies it considers inimical.
>
> *Baldovin, supra,* 626 F.2d at 447 (emphasis supplied.)[4]

The events which precipitated this litigation are as set forth by petitioners. Pet. at 3-4. Respondent Local 1408, ILA refused to load for petitioner Jacksonville Bulk Terminals, Inc. (JBT) superphosphoric acid bound for Russia under an agreement between Occidental Petroleum Corporation (Occidental) and the Soviets, and petitioners commenced this action under LMRA §301.

---

[4] The First Circuit, too, recognized the conscientious nature of the ILA action, when it suggested that a union might find it "repugnant" to handle the goods of any employer with whom it had a dispute. *Allied International, supra,* 640 F.2d at 1375. All courts have recognized that the union's motivation was purely altruistic, inspired by patriotic concerns and the opposition to aggression. *Hampton Roads Shipping Ass'n, supra,* 631 F.2d at 282; *Walsh, supra,* 630 F.2d at 866; *Allied International, supra,* 640 F.2d at 1369; *New Orleans Steamship Ass'n,* 626 F.2d at 459; *Baldovin,* 626 F.2d at 447; *Allied,* 492 F. Supp. at 338; *Walsh,* 488 F. Supp. at 526; *New Orleans Steamship Ass'n,* 486 F. Supp. at 411; *McGrath,* App. at 3, 4; *Jacksonville Bulk, supra,* 32a. Such matters are traditionally within the realm of conscience. *See United States* v. *Seeger,* 380 U.S. 163 (1965).

The district court held that the underlying dispute in this case was not a "labor dispute," and thus the prohibition of Norris-LaGuardia Act §4, 29 U.S.C. §104, did not apply. It issued an injunction against the work stoppage and simultaneously granted specific performance of the arbitration provisions of the collective bargaining agreement. 35a. Contrary to petitioners' present contention, however, the district court in its opinion, found that

> [O]ther than the work stoppage, there appears to be no dispute at all between plaintiffs and defendants. Defendants' underlying objections are *not to the policies of their employer,* but to the political policies of a foreign nation. (emphasis supplied). 32a.

The Fifth Circuit agreed that the union's refusal to service Russian cargo was not motivated "by any dispute with any employer members" and "nothing that these employers might do could have eliminated the cause of the boycott." *New Orleans Steamship Association, supra,* 626 F.2d at 459. In reliance upon this Court's holding in *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO,* 428 U.S. 397 (1976), the court of appeals held that respondents' underlying dispute with the Soviet Union could not be processed under the arbitration clause of the collective bargaining agreement, although the resulting dispute as to whether the unions' action in response to the nonarbitrable dispute violated the no-strike clause might be arbitrable. *New Orleans Steamship Association,* 626 F.2d at 467. The Fifth Circuit recognized that the underlying dispute "was purely a political protest," *Id.* at 459, but rejected the notion that the resulting, arbitrable dispute over violation of the no-strike clause was not a labor dispute within the meaning of the Norris-LaGuardia Act. *Id.* at 465. It held that no injunction could issue prior to a determination by the arbitrator. *Id.* at 469.

Summary of Argument

An action under LMRA §301 by an employer against a union representing its employees to enforce a no-strike pledge falls within the prohibition of §4 of the Norris-LaGuardia Act against the granting of injunctions in labor disputes by federal courts. Such a case by its very nature involves a labor dispute. In situations like that of this case, all courts have recognized that two controversies are involved. The underlying dispute, which may or may not be political, is not arbitrable, nor is it the subject of the litigation. What the court is asked to enjoin is the refusal to provide labor which gave rise to a second dispute over whether there has been a violation of the no-strike clause. This is quintessentially a labor dispute. Cases in which the courts attempted to define the term "labor dispute" but which were not between the employer and the union to compel the furnishing of labor are completely irrelevant.

Petitioners' basic premise, that §301 involves a grant of jurisdiction to enforce collective bargaining agreements which is broader than the bar of Norris-LaGuardia, has been considered by this Court and, in light of the legislative history of §301, expressly rejected. The Fifth Circuit, as well as the Fourth, correctly followed precedent in holding that an employer's attempt to invoke the no-strike clause against the ILA action involves a labor dispute.

A pre-arbitration injunction under *Boys Markets Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970) cannot be issued in this case. This case falls squarely under the rule enunciated by this Court in *Buffalo Forge, supra.* The underlying dispute between the ILA and the Soviet Union over the invasion of Afghanistan is not subject to the provisions of any employer's collective bargaining agreement. It cannot be resolved by arbitration. The resulting dispute, whether the union's action in response to the nonarbitrable dispute violates the no-strike clause, may be arbitrable. However,

under the holding in *Buffalo Forge,* expressly rejecting the position of the dissent, no injunction can issue prior to arbitration.

Whether opposing parties characterize the second dispute as being between the union and the employer over management's right to select customers or to assign work, the fact remains that what petitioners seek to enjoin is an alleged violation of the no-strike clause. Their position flies in the face of what has been recognized by every court, that the *underlying* dispute here is not between the union and the employer and so is not subject to arbitration.

The policy arguments raised by petitioners do not justify reversal of the Fifth Circuit's decision. *Buffalo Forge* itself is an accommodation of the anti-injunction policy of Norris-LaGuardia to the policy favoring arbitration. It enforces the promise to arbitrate, but it refuses to alter it so as to transfer to a district court the decision which the collective bargaining agreement reserves to the arbitrator. The fact that there are political connotations to the ILA's expression of dissent and adherence to conscience cannot justify a departure from ordinary principles of law. Congress has not seen fit to enact any general prohibition of political strikes. Because the refusal to perform work was not over an issue subject to the arbitration clause, the fact that political issues may be involved in the motivation does not warrant special treatment.

The accusation that the ILA was interfering with United States foreign policy is both false and irrelevant. No treaty, law, or regulation mandates any American citizen to do business with a foreign nation, even where such trade is permitted. The ILA's action sought only to regulate its own conduct in the private sphere, not that of other persons and not the policy of the government. Since it was not shown to violate any lawful prohibition, it could not be enjoined.

ARGUMENT

I.

This Case Involves a Labor Dispute Within the Meaning of the Norris-LaGuardia Act.

Federal courts have no jurisdiction to issue injunctions "in any case involving or growing out of any labor dispute" Norris-LaGuardia Act §4, 29 U.S.C. §104.[5] The intent of this statute was "[to take] the federal courts out of the labor injunction business." *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365, 369 (1960). This Court has held that the Act "must not be read in a spirit of mutilating narrowness," *United States* v. *Hutchison*, 312 U.S. 219, 235 (1941), and has consistently "refused to give the Act narrow interpretations that would have restored many labor dispute controversies to the courts." *Marine Cooks and Stewards, supra*, 362 U.S. at 369.[6]

A. *An Action to Enforce a No-Strike Clause in a Collective Bargaining Agreement Involves a Labor Dispute.*

The dispute presented for adjudication in this case fits comfortably within the statutory definition of a labor dispute. Despite petitioners' dissembling, the dispute sub judice concerns the ultimate term and condition of employment: whether, under the circumstances, any labor is required by the collective bargaining agreement between the parties. Whatever its genesis, this case by its terms *involves* a labor dispute between the union and the employer of its members.

---

[5] Among the activities which may not be enjoined is "ceasing or refusing to perform any work or to remain in any relation of employment. . . ." 29 U.S.C. § 104(a).

[6] As defined by the Act: "the term 'labor dispute' includes any controversy concerning terms or conditions of employment. . . ." 29 U.S.C. § 113(c).

Indeed, federal jurisdiction is predicated solely on LMRA §301(a), which gives federal courts jurisdiction over "suits for violation of contracts between an employer and a labor organization." The relief sought is an injunction not against the ILA's ire with the Soviets but against its refusal to perform work. The employer claims that the union's response to its dispute with the Soviets violates its promise not to strike during the term of the contract. This disagreement over whether the no-strike clause has been violated stems from the ILA's dispute with the U.S.S.R. However, it is the contract dispute, the meaning of a clause in the collective bargaining agreement, not the political dispute, which the arbitrator will determine and on which the courts are asked to rule. As this Court has said, "The Act does not concern itself with the background or the motives of the dispute." *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552, 561 (1937).

Petitioners try to avoid Norris-LaGuardia's clear prohibition by a tactic of confusion. In Point I of their brief they focus on the underlying dispute with the Soviet Union, ignoring the alleged breach of contract which they seek to enjoin, and they argue that the dispute here is "political" and so not covered by Norris-LaGuardia. In Point II, in order to concoct an arbitrable dispute, they maintain the ILA's dispute is with its members' employer, as though the U.S.S.R. were not involved.

A proper analysis of the case requires the recognition of both disputes. There is not a single controversy which allows petitioners Janus-like to turn for the Court's inspection the visage convenient to its particular argument at the moment. There are two related, but conceptually distinct, disputes: one between the ILA and the Soviets over the invasion of Afghanistan, a second between the ILA and the employer over the latter's claim that its no-strike clause is being violated.

In *Buffalo Forge*, this Court explicitly recognized that this kind of situation gives rise to two separate disputes.[7] It held that, although the underlying issue was not arbitrable, a second dispute was generated as to "whether the sympathy strike violated the Union's no-strike undertaking." 428 U.S. at 410.[8] With respect to the ILA's action in the instant case, not only the Fifth Circuit but also the Fourth Circuit and the United States District Court for Northern District of New York had no difficulty in identifying the two disputes involved. *Hampton Roads Shipping Association, supra*, 631 F.2d at 285. *McGrath, supra* at A7.

This litigation is over the second kind of dispute. Petitioners seek to enjoin an alleged violation of the no-strike clause, not an alleged violation of the ILA's "legal obligations" to the U.S.S.R. As in *Buffalo Forge*, if the collective bargaining agreement did not contain a no-strike clause, petitioners would have no basis for their lawsuit. Petitioners cannot avoid the ban of Norris-LaGuardia by focusing on the political dispute to which they are not a party and by disregarding the labor dispute which they recognize exists by their own assertion that their labor contract is being violated.

B. *Petitioners' Arguments for the Inapplicability of Norris-LaGuardia Are Without Merit.*

Petitioners' basic fallacy is their assumption that the §301 authorization to federal courts to grant injunctions is broader than the Norris-LaGuardia ban. This contention is untenable in the light of the legislative history of §301 and has been expressly rejected by this Court on at least two occasions.

---

[7] Even before this Court made the matter crystal clear in *Buffalo Forge*, other courts had recognized that, where a union whose collective bargaining agreement had a broad no-strike clause struck over an issue not covered by its arbitration clause, a second, independent dispute was created. *See* page 15 below.

[8] The application of the holding in *Buffalo Forge* to the facts in this case is discussed in Point II.

The Senate Report on §301 recognized that the Norris-LaGuardia Act would bar injunctive relief to enforce collective bargaining agreements. *See Sen. Rep.* No. 105, 80th Cong., 1st Sess. 1947, p. 17. Congress demonstrated with respect to other sections of the Act that it knew how to lift the bar of Norris-LaGuardia when it wished to do so.[9] Indeed, the House version contained a provision that the Norris-LaGuardia Act would not apply to §301 actions, §302(e) H.R. 3020, 80th Cong., 1st Sess. 1947, but it was deleted before the Act was adopted. *See Conference Committee Report, Labor Management Relations Bill,* 1947, H.R. 302, 80th Cong., 1st Sess. June 3, 1947.[10]

In light of this history, this Court has held that the jurisdictional grant to federal courts in §301 to enforce collective bargaining agreements is no broader than the jurisdictional denial to federal courts in Norris-LaGuardia to enjoin labor disputes. In *Buffalo Forge,* the Court expressly reiterated and approved Mr. Justice Black's statement in *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962).

> [T]here is no general federal anti-strike policy; and although a suit may be brought under §301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail. 370 U.S. at 225.

---

[9] *See, e.g.,* 29 U.S.C. § 160 (unfair labor practices); § 178(b) (injunctions during national emergency); § 186(e) (restrictions on financial transactions).

[10] The Senate also considered removing the Norris-LaGuardia bar to enforcing collective bargaining agreements by injunction by the device of making breach of a collective bargaining agreement an unfair labor practice. Unfair labor practices may be enjoined under LMRA § 10, 29 U.S.C. § 160, which is expressly exempt from the Norris-LaGuardia Act. This, too, failed to pass. Section 8(b)(5), § 8(a)(6), S.1126, 80th Cong. 1st Sess. introduced April 17, 1947.

The Court specifically addressed the proposition on which petitioners herein rely, saying:

> Nor was the injunction authorized solely because it was alleged that the sympathy strike called by the Union violated the express no-strike provision of the contracts. Section 301 of the Act assigns a major role to the courts in enforcing collective-bargaining agreements, but aside from the enforcement of the arbitration provisions of such contracts, within the limits permitted by Boys Markets, the Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-LaGuardia Act. In the course of enacting the Taft-Hartley Act, Congress rejected the proposal that the Norris-LaGuardia Act's prohibition against labor-dispute injunctions be lifted to the extent necessary to make injunctive remedies available in federal courts for the purpose of enforcing collective bargaining agreements. *Buffalo Forge*, supra 428 U.S. at 409.

The cases cited by petitioners in their attempt to argue that the Norris-LaGuardia Act does not apply to this case are inapposite. Petitioners conveniently forget that this case is between an employer and a union for specific performance of a labor contract. They cite authority from other areas of law, not involving direct suits between the employer and the union, in which the courts attempted to define the term "labor dispute." These are irrelevant to the dispute between the parties to this action, which is in its essence a labor dispute.[11]

Similarly, the appellate authority relied on by petitioners for their argument that the Fifth Circuit erred in applying Norris-LaGuardia to the dispute here is inapplicable to this case. *Khedival Line* v. *Seafarers' International Union*, 278

[11] Petitioners insist that the existence of a "labor dispute" depends upon the presence of "the employer-employee 'matrix'" Pet. at 12. The plaintiff in this action *is* the employer; the defendant is the union representing the employees.

F.2d 49 (2d Cir. 1960) and *NLRB* v. *International Longshoremen's Association (Ocean Shipping)*, 332 F.2d 992 (4th Cir. 1964) were not §301 suits by employers to require the furnishing of labor under collective bargaining agreements. In *Khedival* the plaintiff was a foreign shipowner which sought to enjoin a picketing union invoking the court's admiralty jurisdiction. *Ocean Shipping* was an unfair labor practice proceeding brought by the National Labor Relations Board to terminate an alleged secondary boycott. In such cases an analysis of the dispute between the union and a third party may be necessary to determine whether it is a "labor dispute" for purposes of Norris-LaGuardia. The analysis is unnecessary where, as here, the case by its very nature involves a labor dispute.

The only two applicable cases cited by petitioners, *West Gulf Maritime Association* v. *International Longshoremen's Association*, 413 F. Supp. 372 (S.D. Tex. 1975), *aff'd without opinion*, 531 F.2d 574 (5th Cir. 1976) and *Harrington & Co.* v. *International Longshoremen's Association*, 356 F. Supp. 1079 (S.D. Fla. 1973), have been thoroughly discredited. Both cases were decided prior to *Buffalo Forge*. Both failed to distinguish between the underlying and resulting disputes. Both hold that no labor dispute is involved but anomalously go on to grant specific performance of a promise not to withhold labor. *West Gulf Maritime Association* cites no authority except *Harrington & Co.* *Harrington & Co.* cites no authority at all. In the decision under review, the Fifth Circuit expressly renounced its earlier affirmance of *West Gulf Maritime Association* and adhered to its prior decision in *United States Steel Corp.* v. *United Mine Workers*, 519 F.2d 1236 (5th Cir. 1975), *rehearing denied*, 526 F.2d 376 (1976), *cert. denied*, 428 U.S. 910 (1976).[13] Other than *West Gulf* and *Harrington*, peti-

[13] This Court cited *United Mine Workers* as "in accord" with the the Second Circuit's holding which it affirmed in *Buffalo Forge*. 428 U.S. at 404 n.9. Thus, the Court implicitly agreed with the Fifth Circuit that the dispute in *United Mine Workers* was a "labor" dispute within the bar of Norris-LaGuardia.

tioners can cite no case where an action directly between the employer and the union over their contract has been held not to involve a labor dispute within the prohibition of Norris-LaGuardia.[13]

II.

The *Boys Markets* Exception to the Norris-LaGuardia Act Does Not Apply to This Case.

A. *Under* Buffalo Forge *a Court May Not Issue a Pre-arbitration Injunction Unless the Strike Is Over an Arbitrable Dispute.*

In 1970 this Court recognized a narrow exception to Norris-LaGuardia's blanket prohibition against the issuance of labor injunctions by federal courts. *Boys Markets, supra.* It held that, where a dispute arises over a matter which the parties have agreed to arbitrate, federal courts may enjoin work stoppages and require arbitration of that dispute.[14]

---

[13] Petitioners are equally in error when they claim that the decision below is alone in holding that a politically motivated work stoppage falls within Norris-LaGuardia. On the contrary, the Fifth Circuit had reached the same conclusion in the *United Mine Working* case, *supra*, as had the Fourth Circuit in *Armco Steel Corp.* v. *United Mine Workers*, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975), where the union's grievance which precipitated the strike concerned state and federal regulations on the allocation, distribution and sale of gasoline. Moreover, with respect to the facts of this very case, not only the Fifth Circuit but also the Fourth, and the District Courts in New Orleans, Hampton Roads and Albany have viewed this case as falling under *Boys Markets/Buffalo Forge*. These holdings have meaning only if Norris-LaGuardia applies. *Hampton Roads Shipping Association, supra*, 631 F.2d at 284, 285; *New Orleans Shipping Association, supra*, 486 F. Supp. at 413; *McGrath, supra*, App. at 7-11.

[14] The only injunction at issue is one granted *prior* to arbitration. Once the arbitrator has ruled, federal courts may enforce his decision without the bar of Norris-LaGuardia. *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960); *Buffalo Forge, supra*, 428 U.S. at 405.

The Court has been careful to point out that *Boys Markets* is a "narrow" exception.[15] The purpose of a *Boys Markets* injunction is not to grant specific performance of some substantive provision of the contract. That is exactly what Norris-LaGuardia prohibits. Rather, the purpose is to protect the arbitrable process by enforcing the union's pledge to arbitrate instead of strike over the substantive issue. *Buffalo Forge, supra,* 428 U.S. at 411. It follows that there can be no *Boys Markets* exception to Norris-LaGuardia unless the dispute *over* which the union is striking is one that it has agreed to submit to arbitration.

After *Boys Markets,* the courts of appeals divided on the question of whether a strike was enjoinable when it was over a grievance which the union had not agreed to arbitrate.[16] In *Buffalo Forge* an employer whose employees were engaged in a sympathy strike in support of another union not a party to their collective bargaining agreement sought a preliminary injunction prior to arbitration. This Court granted certiorari to resolve the conflict among the circuits as to whether a district court could enjoin a strike over a dispute not subject to the arbitration clause of the union's collective bargaining agreement "pending the arbitrator's decision as to whether the strike is forbidden by the express no-strike clause. . . ." *Id.* at 399. The majority prohibited such injunction, saying:

> *Boys Markets* plainly does not control this case. The District Court found, and it is not now disputed, that the strike was not *over* any dispute between the Union

---

[15] *Boys Markets, supra,* 398 U.S. at 253; *Buffalo Forge, supra,* 428 U.S. at 403, 406.

[16] The Third, Fourth and Eighth Circuits were of the view that, even if the underlying dispute was not arbitrable, the question of violation of the no-strike clause was itself an arbitrable issue which permitted a *Boys Markets* injunction. The Second Fifth and Sixth Circuits held that no injunction could issue unless the underlying dispute fell within the arbitration clause. *Buffalo Forge,* 428 U.S. at 404 n.9 (1976).

> and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; . . . Thus, had the contract not contained a no-strike clause or had the clause expressly excluded sympathy strikes, there would have been no possible basis for implying from the existence of an arbitration clause a promise not to strike that could have been violated by the sympathy strike in this case. (citations omitted.) *Id.* at 407, 408.

The Court's denial of a pre-arbitration injunction did not end the controversy. Having found that the underlying dispute was not arbitrable, it identified a second dispute engendered by the first—whether the union's action in response to the nonarbitrable dispute violated the express no-strike clause of the agreement. *Id.* at 409, 410. The Court held that this issue involved "the meaning and application of a no-strike clause" which, under the broad arbitration clause, was itself subject to arbitration. *Id.* at 405, 410. However, the Court held that the question whether the sympathy strike violated the no-strike clause was for the arbitrator, not the courts, to decide. *Id.* It ruled that, while the union might be ordered to arbitrate, the district court was without power to enjoin the strike pending the decision of the arbitrator. *Id.* at 412, 413.

> [I]t does not follow that the District Court was empowered not only to order arbitration but to enjoin the strike pending the decision of the arbitrator, despite the express prohibition of §4(a) of the Norris-LaGuardia Act. . . .
>
> If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of §4. *Id.* at 410.

Boys Markets permits a pre-arbitration injunction not because the court is convinced that the union is breaching its contract but because the union has elected to strike over, rather than to arbitrate, a matter it has clearly promised to arbitrate. In the *Buffalo Forge* situation it can never be said that the union is striking over the issue whether the no-strike clause is being violated. It is not, therefore, striking over an arbitrable issue.[17]

B. *The Court of Appeals Correctly Held That* Buffalo Forge *Applies to This Case.*

Every criterion which led this Court to find that the underlying dispute in *Buffalo Forge* was not arbitrable applies equally to the underlying dispute in this case.

"The union has gone on strike not by reason of any dispute it or any of its members has with the employer." Buffalo Forge, 428 U.S. at 404, 405. Three courts of appeals and six district courts have held that the underlying dispute is between the ILA and the Soviet Union, not between the union and its employers. See pp. 25-27 below.

"The strike was not over any dispute between the union and the employer that was even remotely subject to the

---

[17] Consequently, after *Buffalo Forge,* the courts of appeals have been unanimous in holding that, where the underlying dispute over which the union is striking is not arbitrable, a preliminary injunction may not be granted prior to arbitration of the issue whether the no-strike clause has been violated. *NLRB* v. *C.K. Smith & Co.,* 569 F.2d 162 (1st Cir. 1977); *Corporate Printing Co.* v. *New York Typographical Union Number 6,* 555 F.2d 18, 20 (2d Cir. 1977); *Latrobe Steel Co.* v. *United Steelworkers,* 545 F.2d 1336, 1341 (3d Cir. 1976); *Cedar Coal Co.* v. *United Mineworkers,* 560 F.2d 1153, 1169 (4th Cir. 1977); *Jacksonville Maritime Association, Inc.* v. *International Longshoremen's Association, AFL-CIO,* 571 F.2d 319, 325 (5th Cir. 1978); *Walker Bros. Stone Co.* v. *United Steelworkers, AFL-CIO,* 620 F.2d 132 (6th Cir. 1980); *NLRB* v. *Keller-Crescent Co.,* 538 F.2d 1291, 1295 (7th Cir. 1976); *National Rejectors Industries* v. *United Steelworkers of America,* 562 F.2d 1069, 1075 (8th Cir. 1977); *J.A. Jones Construction Co.* v. *Plumbers and Pipefitters Local 598,* 568 F.2d 1292 (9th Cir. 1978).

arbitration provisions of the contract." Id. at 407. Clearly the imperialistic designs of the Soviet Union were not within the contemplation of the parties when they agreed to the broad arbitration clause in their collective bargaining agreement. Indeed, the underlying dispute in the case at bar is even further removed from the arbitration clause than was the underlying dispute in *Buffalo Forge*, for there the employer had the actual power to settle with the sister union, whereas here neither JBT nor even Occidental can affect the Soviet Union's military policy.

"The strike at issue was a sympathy strike. . . ." Id. The courts are in agreement that the strike here is in the nature of a sympathy strike over issues not between the parties to the collective bargaining agreement.[18] In all its critical elements, the ILA action is indistinguishable from a classic sympathy strike in support of another union. Its motivation is purely altruistic, not calculated to gain the striking union any economic benefit or advantage. The union refused to service Russian goods or ships out of *sympathy* for the oppressed people of Afghanistan. Indeed, it may be said that longshoremen were honoring a symbolic picket line raised by the oppressed victims of the Soviets. The Afghan pickets may be prevented from appearing by the Russian aggressors, but they are present in spirit wherever the Soviets manifest themselves. Out of sympathy, longshoremen would not cross the picket line to offer even indirect aid to the Russian war machine.

---

[18] The district court in *McGrath, supra*, recognized the sympathetic nature of the ILA action, when it compared "the case at bar and similar litigation involving similar sympathy strikes, including other litigation involving the ILA's refusal to service . . . the Soviet Union." App. at 12. *Cf. Allied, supra*, 640 F.2d 1372 n.3. It should be noted, however, *Buffalo Forge* is not limited to sympathy strikes but to any work stoppage occasioned by a nonarbitrable dispute. *Hampton Roads, supra*, 631 F.2d at 286; *United States Steel Corp. v. United Mineworkers*, 519 F.2d 1236 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976). This Court cited *Mineworkers* in *Buffalo Forge*, thus dispelling the suggestion that only sympathy strikes were intended to be covered. 428 U.S. at 404, n.9.

"Neither its causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and respondents." *Buffalo Forge*, 428 U.S. at 407, 408. Manifestly, there is nothing for an arbitrator to determine with respect to the union's grievance against the Soviet Union. (*See* pp. 23-24, *infra*) As the Fifth Circuit recognized "[N]o arbitrator can tell the Soviets to withdraw from Afghanistan." *New Orleans Steamship Association*, 626 F.2d at 467. The Solicitor General agrees that submitting this dispute to arbitration would be "an absurdity." Amicus at 22.

"The strike had neither the purpose nor effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain." *Buffalo Forge*, 428 U.S. at 408. Since the underlying dispute with the Soviets is not subject to arbitration, the union's work stoppage cannot be an evasion of the duty to arbitrate. Nor is the employer deprived of its bargain because, by its terms, this particular dispute does not fall within the agreement to arbitrate.[19]

Applying these criteria the court below held:

> While the question of whether the strike itself violated the parties' agreement is arbitrable, the underlying dispute between the ILA and the Soviet Union is not. *New Orleans Steamship Association, supra*, 626 F.2d at 467.

In a related case involving the same ILA action, *Hampton Roads Shipping Association, supra*, the Fourth Circuit expressed a similar understanding of *Buffalo Forge*.

---

[19] Petitioners confuse the issue by claiming that the employer is deprived of his bargain to be free of strikes. (Pet. at 7, 9, 27-30). That is not the bargain the Court was referring to in *Buffalo Forge*. Rather, it was the agreement to *arbitrate*. Petitioners beg the question, for the premise they assume—that the work stoppage over a nonarbitrable dispute deprives them of their bargain to be free of strikes—is the very issue to be *arbitrated*. Petitioners merely espouse the former view of the Third, Fourth and Eighth Circuits, which this Court soundly rejected in *Buffalo Forge*. *See* p. 15, *supra*.

> If the underlying dispute is not subject to contractual grievance and arbitration proceedings, it is not arbitrable, and under *Buffalo Forge* the work stoppage cannot be enjoined pending arbitration. The work stoppage may still be prohibited by a general no-strike clause, but this must be decided initially by the arbitrator. The Supreme Court in *Buffalo Forge* explicitly stated that a work stoppage cannot be enjoined during pendency of that arbitration.
>
> • • •
>
> The grievance the Union has against the Soviet Union is clearly not arbitrable. Therefore, the only clause of the collective bargaining agreement that may have been violated by the Union in this dispute is the no-strike clause. The questions of its arbitrability and whether it prohibited the work stoppage are both for the arbitrator. It was error under the circumstances of this case to issue an injunction prior to completion of arbitration. *Hampton Roads Shipping Association, supra,* 631 F.2d at 285, 286.

C. *The Underlying Dispute in This Case Is Not Over "Management Rights."*

Faced with the clear holding of *Buffalo Forge,* petitioners and the Solicitor General seize upon the device of placing the label of arbitrability on what is manifestly a dispute with the Soviet Union. They try to characterize the *underlying* dispute in this case so as to bring it within the arbitration clause. They do not agree on what the underlying dispute is, but they are sure it is "arbitrable." Unable to state a convincing case for his particular characterization, each falls back on the "presumption of arbitrability" to justify a pre-arbitration injunction. Pet. at 25; Amicus at 23.

Petitioners characterize the underlying dispute in this case as between the union and employer "prompted by an

arbitrable dispute between the parties" over the "union's disapproval of Occidental's decision to choose the Soviet Union as a business partner", a decision petitioner labels a "management right". Pet at 8.

To call this a "management rights" dispute is merely to reach for a convenient label. What petitioners seek to enjoin is the union's refusal to work. Any intrusion on "management rights" would be by way of violating the no-strike clause. If the collective bargaining agreement did not contain a no-strike clause, none could be implied, for the union never agreed to arbitrate its underlying dispute. There may be an arbitrable dispute as to whether striking over a nonarbitrable dispute violates management's prerogative, but *Buffalo Forge* clearly holds that no injunction can issue until the arbitrator rules. 428 U.S. at 408.

The ILA action was directed against the Soviet aggressors, not against any American employer. The longshoremen did not say to their employers, "You may not do business with Russia." They said to the Soviets, "You may not have the benefit of our labor while engaged in aggression." The fact that the union did not refuse to handle the non-Soviet goods of persons dealing with Russia disproves the existence of any intent by the union to dictate the employer's choice of customers. "[E]ven where the American entities have diverted ships from ports where the ILA work stoppage is effective to ports where it has been enjoined, . . . avoiding the ILA work stoppage," the union has continued to service the employers. *Baldovin, supra,* 626 F.2d at 452.

D. *The Underlying Dispute in This Case Is Not Over "Work Assignment."*

Like petitioners, the Solicitor General attempts to manufacture an underlying arbitrable dispute over "management rights" so as to avoid the plain dictates of *Buffalo Forge.* Whereas petitioners invoke management's right to choose its customers, the Solicitor General postures the dispute as

over "work assignment" or "cargo handling." Amicus at 11, 22, 23.[20] In an attempt to achieve a desired result, the Solicitor General distorts both facts and the law.

The lengths to which the Solicitor General must go to arrive at the construct that there is an arbitrable dispute are shown by his introduction of the novel doctrine of *several* underlying disputes, all of which are the supposed "proximate cause[s]" of the refusal to work. Amicus at i, 20. Even this fancy semantic footwork cannot obscure the plain and irrefutable fact that the seminal event was the Soviet invasion of Afghanistan. This is what prompted the Union's refusal to handle Soviet goods.[21]

The ultimate test of the Solicitor General's theory is to apply it to the facts of *Buffalo Forge*. There, as here, it would have been possible to characterize the dispute in terms of management's right to assign and direct work.[22]

---

[20] Petitioners seem to have half-heartedly made the same argument in their complaint to the district court. (Complaint, ¶ 24-27, JA at 9, 10) The district court did not accept it. It was not urged by petitioners in the court of appeals or to this Court, where they choose to emphasize selection of customers.

[21] The Solicitor General is correct in including the previous dispute between the U.S.S.R. and Afghanistan in the chain of events, just as in *Buffalo Forge* the dispute between the employer and the sister union was the event which evoked the striking union's sympathy. As in *Buffalo Forge*, where sympathy for others was the cause of the union's action, so here ILA's sympathy for the Afghans and its outrage with the Russians precipitated all that followed. It is possible to describe *all* intervening events as "underlying" the ultimate event. What *Buffalo Forge* requires is that *the* underlying dispute, the matter *over* which the union strikes, not the intermediate events, be arbitrable.

[22] In fact, the employer in *Buffalo Forge* made a claim in the district court very similar to that of the Solicitor General here. In addition to its allegation of breach of the no-strike clause, it also claimed in the alternative that the strike was caused by "refusal to follow a supervisor's instructions to cross the . . . picket line." *Buffalo Forge, supra*, 428 U.S. at 401. The district court, however, found that the strike was in sympathy for the sister union and was not over a dispute that the parties were contractually bound

Indeed, every strike can be characterized in terms of work assignment, for the essence of a strike is to refuse work. Every refusal to cross a picket line can be expressed in terms of work direction, for the significance of not crossing the line is that one will not accept work on the other side. Thus, the dispute in *Buffalo Forge* could be cast in the same terms that the Solicitor General urges here. The union's dispute could be said to have been with its employer over the employer's right to assign the union work while its sister union was on strike. So viewed, the strike in *Buffalo Forge*, or any strike for that matter, could be said to be over an arbitrable dispute, and "the policy of Norris-LaGuardia virtually obliterated." *Buffalo Forge, supra*, 517 F.2d at 1211.

The Solicitor General's attempt to characterize this dispute as one over work assignment flies in the face of all the facts. The union never claimed that handling Russian cargo would be undue hardship or "an unreasonably burdensome condition"; it claimed it would be *wrong*. The union's objection had nothing to do with the nature of the work or the cargo involved; it had to do with the ultimate beneficiary. The union was not striking *over* its right not to accept work; it was striking out of sympathy

---

to arbitrate. *Id.* at 409, 410. The "work assignment" argument was not pressed in the subsequent appeals. *See Buffalo Forge, supra*, 517 F.2d at 1211, n.7.

The claim of the employer in *Buffalo Forge* was far stronger than the Solicitor General's, for it did not rely on mere characterization of breach of the no-strike clause as a refusal to accept a work assignment. It relied instead upon a specific instance where an actual individual refused to obey orders. The district court after a hearing held that the work stoppage came about "because of the direction of the International Union to members of the Defendant Locals to respect the picket lines. . . .," *Buffalo Forge, supra*, 386 F. Supp. at 409, not over a failure to obey work orders. The employers in *Buffalo Forge* did not go on to advance the untenable argument made here, that such a strike was over a general refusal to obey a work assignment rather than over a nonarbitrable dispute.

for Afghanistan. It was not attempting to force JBT to allow it not to handle Russian goods; it was striking to express sympathy and moral indignation. Most important, it cannot be said here that the union was trying to force the employer to yield on a disputed issue. The Solicitor General's suggestion that the union decided "to call a strike rather than run the risk of losing in arbitration," Amicus at 26, is pure nonsense. The very issue of the union's right to strike will—and must—be arbitrated under *Buffalo Forge*. It is absurd to say that the union struck so as to avoid arbitrating whether it has to do the work, since that is the very issue which must be decided by the arbitrator under the no-strike clause.

The key to *Buffalo Forge* is that a union is not striking *over* any dispute it had promised to arbitrate, which is evidenced by the fact that, even under the broadest arbitration clause, there is nothing for the arbitrator to resolve. 428 U.S. at 407-08. Under the Solicitor General's theory, presumably an arbitrator could say that, on the basis of some "hardship", the union was permitted to refrain from handling Russian goods.[23] Such a ruling would hardly redress the union's real concern. The occupation of Afghanistan would persist. The arbitrator would only be permitting the union to continue to protest its real grievance. He would not be resolving it.[24]

---

[23] That the Solicitor General is merely disguising the issue in *Buffalo Forge* is evident from the fact that such a ruling would say no more than that the union is free to strike. It is but another way of saying there is no violation of the no-strike clause—the arbitrable, but second, dispute recognized by *Buffalo Forge* and held there not to warrant a pre-arbitration injunction.

[24] The arbitration cases cited by the Solicitor General, Amicus at 22, are completely inapplicable to the case at bar. First, the fact that both sides voluntarily agreed to arbitrate the work assignment issue without objection is no authority that it would be *required* to be arbitrated under the contract. The Solicitor General cites no case dealing with that question. Second, none of the cases cited involves a strike by the entire union, only refusals to accept a particular as-

Thus, the Solicitor General's attempt to find an underlying arbitrable dispute over "work assignment" is as unavailing as petitioners' attempt to find an underlying arbitrable dispute over "choice of customers." Each reaches for a convenient label and disregards the realities.

E. *The Underlying Dispute Here Is With the Soviets.*

Despite the Procrustean attempts to fit the underlying dispute in this case into the language of some express provision of the collective bargaining agreement which might be arbitrable, there has never been any real doubt that the underlying dispute is between the ILA and the U.S.S.R. over a matter unconnected with the contract. Petitioners' attempt to characterize it as a dispute with the employer, improvised on by the Solicitor General, was rejected by both the trier of fact and the reviewing court in this case, and by every other court which has addressed the ILA/Soviet dispute.

The district court in this case expressly disagreed with petitioners' characterization of the underlying dispute. It found:

> [O]ther than the work stoppage, there appears to be no dispute at all between plaintiffs and defendants. Defendants underlying objections are not to the poli-

---

signment by one, two or at most three individuals. Violations of a no-strike clause, by whatever name, are simply not involved. Third, each case involved the propriety of employer discipline against the recalcitrant individual. Here, the employer cannot and has not tried to discipline the entire union. Fourth, in each instance the arbitrator could grant real relief to either of the contesting parties. He could uphold the discipline, or he could order the employer to rearrange work assignments or schedules to accommodate the individual. Fifth, the individual who refused a work assignment did not do so in response to some other, nonarbitrable dispute. His only dispute was with the employer. He could be satisfied by being relieved of the obligation to obey the employer's direction. Here, the ILA did not want to avoid work; it wanted to express sympathy with the Afghans.

> cies of their employer, but to the political policies of a foreign nation. *Jacksonville Bulk, supra,* at 32a.

The Fifth Circuit likewise expressly rejected it.

> The union's grievance is not, as asserted by JBT, a complaint against JBT doing business with the Soviets. It is a complaint against the actions of the U.S.S.R. itself. The union seeks to deny the Soviets the benefit of the labor of its members as long as that nation is engaged in what the union considers aggression. *New Orleans Steamship Association, supra,* 626 F.2d at 467.

Other courts which have considered the same dispute concur. The Fourth Circuit has ruled:

> The underlying cause of the Union's grievance in this case was their disagreement with the Soviet Union over its invasion of Afghanistan. *Hampton Roads Shipping Association, supra,* 631 F.2d at 285.

The United States District Court for the Eastern District of Louisiana found:

> The work stoppage in this case was not a result of a dispute with the employer but was a political protest against the Soviet invasion of Afghanistan. *New Orleans Steamship Association, supra,* 486 F. Supp. at 411.

The United States District Court for the Northern District of New York said:

> There are two disputes here, one with the Russians—the basis of the union's refusal to work; the other with management over the union's right to refuse to work. *McGrath supra.* (App. at 7).

Similarly, in the cases arising from charges that the ILA's action violates the prohibition on secondary boycotts

of LMRA § 8(b)(4), the courts have unanimously found that there is no dispute between the union and its employers. In sustaining a complaint under LMRA § 303, 29 U.S.C. § 187, alleging a secondary boycott, the First Circuit determined that there was no primary dispute between the ILA and its employers. *Allied International, supra,* 640 F.2d at 1377.

The District Court for the District of Massachusetts said:

> This is a primary boycott of Russian goods, with incidental effects upon those employers who deal in such goods. *Walsh, supra,* 488 F. Supp. at 531.

In *Baldovin, supra,* the District Court for the Southern District of Texas, dismissed a petition for a preliminary injunction under LMRA § 10*(l)* on the grounds that the dispute was not "in commerce." Since the underlying dispute was not in commerce, it could not have been between the ILA and an employer of ILA labor. On the other hand, the District Court for the Southern District of Georgia in *Mack, supra,* granted a § 10*(l)* injunction based on a secondary boycott charge. *See Baldovin* v. *ILA, supra.* Implicit in the granting of the injunction was a recognition that the union's dispute is not with its employers. *See Baldovin, supra; Walsh, supra.*

Thus, there is overwhelming judicial agreement that the underlying dispute in this case is between the ILA and with the Soviets and is not covered by any collective bargaining agreement.

F. *Petitioners and the Solicitor General Urge the Position of the Dissent in* Buffalo Forge.

Petitioners and the Solicitor General, like the employer in *Buffalo Forge,* argue that the question of violation of the no-strike clause is arbitrable and that, under the policy favoring arbitration, a preliminary injunction should issue. Pet. at 25, 29-30, Amicus at 21, 25. This was, of course, the

very position of the dissent in *Buffalo Forge*. *Id.* at 431-32. It was soundly rejected by the majority.

> The dissent suggests that injunctions should be authorized in cases such as this at least where the violation, in the court's view, is clear and the court is sufficiently sure that the parties seeking the injunction will win before the arbitrator. But this would still involve hearings, findings, and judicial interpretations of collective-bargaining contracts. It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly preempted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted.
>
> • • •
>
> With these considerations in mind, we are far from concluding that the arbitration process will be frustrated unless the courts have the power to issue interlocutory injunctions pending arbitration in cases such as this or in others in which an arbitrable dispute awaits decision. *Id.* at 412.

Petitioners complain that, in deciding that the underlying dispute was not arbitrable, the Fifth Circuit usurped the function of the arbitrator. Pet. at 27. Whenever a court is faced with an application for a pre-arbitration injunction, it is required to make some ruling as to the arbitrability of the underlying dispute. That minimal decision is thrust on it by the plaintiff. This Court has repeatedly recognized such responsibility in the courts. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 228 (1962) (Brennan, J. dissenting); *Boys Markets, supra*, 398 U.S. at 254; *Buffalo Forge, supra*, 428 U.S. at 406-07. Although the court must "presume" the dispute is arbitrable, that presumption may be rebutted. In the instant case, where nine different United States courts have agreed that the underlying dis-

pute is not subject to arbitration, the presumption has clearly been rebutted. Since the underlying dispute here is not arbitrable, the Fifth Circuit correctly reversed the granting of a pre-arbitration injunction.

III.

Policy Considerations Do Not Warrant Reversal of the Fifth Circuit's Decision.

A. *There Is No Federal Policy Prohibiting Political Strikes.*

Petitioners suggest that the political connotations of the underlying dispute remove this case from ordinary labor law considerations and subject it to a supposed "anti-political strike" policy.

The ILA's action was not strictly speaking a political strike. The refusal to work was not accompanied by an intent to influence public policy.[25] Longshoremen sought to control only their own conduct. They asked no one else to boycott the U.S.S.R. Without any practical hope of deterring Soviet aggression, they expressed disapproval of that policy, seeking only to refrain from contributing to the well-being of the aggressor out of sympathy for its victims, even at considerable financial sacrifice.

Petitioners cite no authority for their general proposition that there is a policy against political strikes. *See* Pet. at 19-22. None of their cases stands for the proposition that political strikes are forbidden per se. Rather, each case involved an alleged violation of a particular statutory

---

[25] *Cf. Missouri* v. *NOW, supra.* In *NOW,* pressure was brought to bear on the state legislature to affect its political decision whether or not to ratify the Equal Rights Amendment. 620 F.2d at 1302. Such activity, which was vindicated by the courts, partakes deeply of the political. The ILA action in this case, inspired not by political, but by moral values, does not seek to affect the Legislature or the Executive but only to express disapproval and vindicate conscience. *See also Henry* v. *First National Bank, supra.*

prohibition, and the issue was whether the political nature of the conduct absolved the participants from what would otherwise have been unlawful activity.[26] The decisions do not even remotely suggest that, absent the finding of a violation, the activity would be prohibited simply because it was political.

When these cases are read in the light of the First Amendment, there is no prohibition on political strikes or boycotts unless the conduct involved violates some specific provision of public or private law.

If there is to be a general policy against political strikes, it should come from Congress.[27] In the absence of legislation, the courts should not create such a policy either directly or by indulging in fictions designed to predetermine the outcome by manipulating the law or the facts. The Fifth Circuit correctly decided this case on labor law principles, recognizing that the touchstone of the *Buffalo Forge*

---

[26] *Eastex* v. *NLRB*, 437 U.S. 556 (1978), dealt with the question of whether the participating employees enjoyed the protection of NLRA § 7, 29 U.S.C. § 157. The same is true of *Auto Workers Local 174* v. *NLRB*, 106 LRRM 2561 (D.C. Cir. March 3, 1981). The cases cited at Pet. 21 involved the question whether a particular issue was a mandatory subject of bargaining under NLRA § 8(b), 29 U.S.C. § 158(b). The First Circuit decision in *Allied International, Inc., supra*, involved the claim of secondary boycott and antitrust violations.

[27] "Congress may, under its constitutional power to regulate commerce among the several states, attempt to prevent political strikes and other kinds of direct action designed to burden and interrupt the free flow of commerce." *American Communications Association* v. *Douds*, 339 U.S. 382, 390-91 (1950); *see also, United States* v. *Brown*, 381 U.S. 437, 450 (1965). This does not suggest that Congress has *exercised* that power. In *Douds*, the Court upheld the constitutionality of LMRA § 9, which required union officers to sign a non-Communist oath, on the ground that Communist motivated political strikes were a threat "which it was the purpose of § 9(h) of the Act to remove." *Id.* at 388. Obviously, if political strikes in general were unlawful, this reasoning would not have applied. The possibility of lawful political strikes was again recognized in 1965 in *Brown*.

doctrine is the nonarbitrability of the underlying dispute and not its political nature.

B. *The Decision Below Furthers the Federal Policy Favoring Arbitration of Labor Disputes.*

Throughout their brief, petitioners complain that the Fifth Circuit's decision undermines the longstanding policy favoring arbitration. Pet. 6, 8, 25-27, 30-31. Petitioners' desire to arbitrate their dispute with respondents is belied by the fact that, since February 1, 1980, they have had an order requiring respondents to arbitrate the alleged violation of the no-strike clause. However, for sixteen months petitioners have failed to go to arbitration. The tears they shed for the sanctity of the arbitrable process have a decidedly crocodilian flavor.

Be that as it may, the majority decision in *Buffalo Forge* and the decision below actually foster the arbitration process while accommodating the equally strong policy of Norris-LaGuardia of keeping federal courts out of the labor injunction business. *Buffalo Forge* fully enforces the parties' agreement to arbitrate. However, it prohibits the issuance of a pre-arbitration injunction based on the court's view of the merits of the case. The parties have agreed that interpretation of the contract is for the arbitrator, not the courts. "They have not contracted for a judicial preview of the facts and the law." 428 U.S. at 411. Because the court's finding would be likely to influence the arbitrator's decision, 428 U.S. at 412, and a pre-arbitration injunction is likely to be dispositive of the controversy, the policy of promoting arbitration would be subverted, not served, by any other course. Id.[18] Adoption of petitioners' position that a union may be enjoined from striking over

[18] The present case is a prime example of how a pre-arbitration injunction may be dispositive of the controversy. Having obtained an injunction, petitioners had achieved their purpose and never went to arbitration, arguing to the Fifth Circuit that the case was moot. *See New Orleans Steamship Association, supra*, 626 F.2d at 461-62; Plaintiff-Appellees' Brief in *New Orleans Steamship Association, supra*, dated February 28, 1980, Point I.

an issue which cannot be arbitrated would deter unions from entering into broad no-strike/arbitration clauses. The Solicitor General's approach of labeling as "underlying" or "arbitrable" a dispute in which arbitration can give the union no redress would have a chilling effect on labor's willingness to give up its economic weapon in return for a meaningless formality.

C. *Petitioners Do Not Lack Alternative Remedies.*

Petitioners' claim that the Fifth Circuit's decision deprives an employer of any remedy for an alleged breach of its collective bargaining agreement is misleading and begs the question. Whether petitioners are entitled to any remedy depends upon their rights under the contract.[29] They have bargained to have this decided by the arbitrator not the courts. All that petitioners have been deprived of is relief *prior* to adjudication in the agreed upon forum. Petitioners still have the remedy for which they contracted; the arbitrator will decide the issue and grant the appropriate relief.[30]

---

[29] Petitioners assume that they will be successful on the merits of their claim that the no-strike clause has been violated. However, the outcome is far from certain. While one cannot—and, indeed, should not—predict how an arbitrator *may* rule with respect to a particular contract, the weight of judicial authority goes against petitioners. Both the First and Third Circuits, as well as the National Labor Relations Board have taken the position that a work stoppage over a nonarbitrable dispute does *not* violate even a broad no-strike clause. *NLRB* v. *C.K. Smith & Co., Inc.*, 569 F.2d 162 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978); *United Steelworkers* v. *Fort Pitt Steel Casting*, 635 F.2d 1071 (3d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3727 (March 16, 1981); *Delaware Coca-Cola Bottling Co.* v. *General Teamster Local Union 326*, 624 F.2d 1182 (3d Cir. 1980); *Pacemaker Yacht Co.*, 253 N.L.R.B. 95 (1980). *Contra, Iowa Beef Processors, Inc.* v. *Amalgamated Meat Cutters*, 597 F.2d 1138 (8th Cir.), *cert. denied, Amalgamated Meatcutters* v. *Iowa Beef Processors, Inc.*, 444 U.S. 480 (1979).

[30] That the courts and the NLRB have found that other remedies are unavailable after a determination on the merits, *see* cases cited at Pet. 32, 39-42, is irrelevant to the question of whether petitioners' collective bargaining agreement gives them the right to a preliminary injunction here.

D. *Respondents Have Not Interfered With United States Foreign Policy.*

Petitioners' argument, belatedly concurred in by the Solicitor General,[31] that the Fifth Circuit's decision permits the ILA to interfere with the foreign policy of the United States overlooks one critical fact. In this country, as opposed to the Soviet Union, citizens are free to act in a manner inconsistent with the policy of the Executive Branch unless and until it can be shown that their conduct violates some treaty, law or valid regulation.

Respondents do not deny that the Executive has primary responsibility for foreign policy or that President Carter's embargo represented what the Executive Branch believed to be the appropriate *governmental* response to Soviet aggression. This does not mean that, within the law, there is not room for private action as well. It does not mean that private citizens are precluded from coming to their own conclusions. That foreign policy permits the Bolshoi Ballet to perform in this country does not require any American to buy tickets. That there was no embargo on the importation of vodka and caviar does not make them

---

[31] The position of the Solicitor General in this Court is slightly more appealing than the stance taken by the Executive Branch in the litigation below. In both the district court and the court of appeals, as well as in several other cases arising out of the same ILA action, the Government declined to take "any position on the merits" but openly announced the result it wished the courts to reach. See brief of the United States as amicus curiae dated July, 1980, pp. 1-5, *Jacksonville Bulk Terminals Inc.* v. *International Longshoremen's Association (New Orleans Shipping Association)*, *supra*. This attitude, if taken by a private litigant, would result in short-shrift being given to his claim. In this Court the Solicitor General finally takes a position on the merits, but he appears not on behalf of any agency with an interest in the correct application of the labor laws but on behalf of the Departments of State and Agriculture, whose only interest, as repeatedly expressed, is that the ILA be enjoined, no matter what the merits of the case. This may explain why the Solicitor General's stand on the labor law issues ranges from his obvious, sensible position that the case does involve a Norris-LaGuardia labor dispute to the fanciful proposition that there are a litter of underlying disputes.

staples of the American diet. So, too, that President Carter forbade certain trade with the Soviets does not mean that he *mandated* all other trade or that any particular person in the United States must do business with Russia.

In fact, the ILA action in this case did not infringe upon American foreign policy. The District Court for the District of Louisiana put the matter correctly:

> The determination of this country's foreign policy is also not at issue. That is a matter for the Executive and Legislative Branches of Government.
>
> The sole issues to be determined are matters of contract. *New Orleans Shipping Association, supra,* 486 F. Supp. at 412.[32]

Neither the Solicitor General nor petitioners can point to any violation of public law—only to an alleged breach of a private contract.[33]

In a totalitarian state a citizen fails to tow the party line at his peril. It is not so here. As long as the ILA acts within the law, it may regulate its own conduct as it

---

[32] The Fourth Circuit refused to allow the question as to the propriety of the ILA action to play any part in its adjudication of the labor law issues. *Hampton Road Shipping Association, supra,* 631 F.2d at 285. The district court in the case at bar, however, believed that the opposition of the Administration was "perhaps the most important factor in this determination," 34a, despite the Administration's refusal to offer a position on the merits.

[33] The treaty authorizing the sale of grain to the Soviet Union which was submitted to the court of appeals (Brief of the United States As amicus curiae filed July, 1980, Addendum C) states in Article I that the U.S.S.R. shall purchase grain from "private commercial sources" and that the United States shall "facilitate and encourage such sales by private commercial sources." Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialists Republics On The Supply of Grain, October 20, 1975, 26 U.S.T. 2972. Thus, the treaty merely establishes that it is the policy of the United States to *encourage* such sales. It should not be read as *requiring* private parties to participate therein in violation of their consciences.

wishes.[34] To the extent, then that foreign policy is urged as a ground for disregarding the law or bending the facts of this case, it is an argument more suited to Occidental's customer and unworthy of the Solicitor General. If there is a danger, as suggested by the Solicitor General, Amicus at 26, n.17, that other nations (especially those with no tradition of citizens' rights) may view a court's determination of private rights as "an extension of United States foreign policy," that is no reason to adopt the totalitarian approach. Rather, the application of the law by independent courts, unswayed by irrelevant considerations of politics or expediency, might well be an export to the Soviets that even the ILA would applaud—a lesson in freedom.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Dated: July 16, 1981

Respectfully submitted,

THOMAS W. GLEASON
Attorney for Respondents
One State Street Plaza
New York, N.Y. 10004
(212) 425-3240

Of Counsel:

ERNEST L. MATHEWS, JR.
CHARLES R. GOLDBURG

[34] That longshoremen occupy an important position in the stream of commerce can be no reason—absent a valid law—for denying them rights possessed by all citizens. If American grain producers yielded to their consciences rather than their pocketbooks and, as private businessmen, declined to deal with the Soviets, would anyone seriously argue that they could be required to do so?

APPENDIX

APPENDIX

Memoradum-Decision and Order

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

80-CV-150

JOHN W. McGRATH CORPORATION,

Petitioner,

—v.—

ATLANTIC COAST DISTRICT ILA and Affiliated Local #1294, its Officers, Agents and Members,

Respondents.

APPEARANCES:

Of Counsel:

McHUGH HECKMAN SMITH & LEONARD, ESQ.
Attorneys for Petitioner
80 Pine Street
New York, New York 10005

MARTIN J. McHUGH, ESQ.
DENNIS McMAHON, ESQ.
THOMAS F. BAILEY, ESQ.

DOMINICK TOCCI, ESQ.
Attorney for Local 1294 ILA
112 State Street
Albany, New York 12201

THOMAS W. GLEASON, ESQ.
Attorneys for Atlantic Coast District ILA
One State Street Plaza
New York, New York 10004

ANDREA MAZZOLA, ESQ.

NEAL P. McCURN, D.J.

Appendix—Memorandum and Order

MEMORANDUM-DECISION AND ORDER

This is a petition for an order compelling performance of an agreement to arbitrate pursuant to the provisions of a Labor-Management Contract between petitioner and respondent. The petitioner also seeks injunctive relief pending arbitration. Petitioner is a New York Corporation doing business as a stevedore in the Port of Albany, New York. Respondent is a labor organization with its principal place for transaction of business in the City of Albany, New York.

Petitioner (McGrath) and respondent (Union) entered into an agreement concerning performance by respondent's members of labor for petitioner's activities in the Port of Albany. This "General Cargo Agreement", provided for the respective obligations of the parties in connection with loading and unloading of cargos and the rigging of ships in the Port of Albany, Rensselear and vicinity.

The Agreement governs the means by which McGrath obtains labor for its stevedore activities in the Port of Albany and contains the following pertinent arbitration clauses: (emphasis supplied)

GENERAL CARGO AGREEMENT

Pg. 1

> The Union shall have the right to select one member apart from the regular gangs to represent the membership during ship operations. He shall be among the first men to be hired and the last to be discharged. He shall be empowered to correct any unsafe working condition that may be brought to his attention. He shall handle any dispute between the parties and resolve such disputes at the pier level. When such

disputes cannot be resolved at the pier level, *he shall present them for arbitration through the Arbitration and Grievance machinery,* and see that *there is no stoppage of work while such disputes are being arbitrated,* except that to continue to work may endanger the lives of the men, then the dispute shall be immediately adjusted by the parties. He shall see that all of the terms of this agreement are faithfully carried out by both parties. He shall have the right to consult with other officers on the job if any deviation to any condition herein is to be considered.

• • •

11. GRIEVANCE AND ARBITRATION:

(a) Any dispute or controversy which may arise as to interpretation or application of any of the provisions of this agreement, including all matters herein which expressly provide that they shall be dealt with in accordance with this Clause, shall be referred to an Arbitration Committee for adjustment or decision, as provided for herein. *Pending such adjustment or decision, the men shall continue to work.*

The facts leading up to the present dispute are as follows:

On February 8, 1980, the grain vessel AENEAS berthed at the McGrath facility in Albany for the purpose of taking on a shipment of grain for export to the U.S.S.R. When McGrath personnel ordered labor to work the ship, the Union refused to supply such labor. The refusal is part of a national policy adopted by affiliated locals of the International Longshoremen's Association to refuse to load grain on ships bound for Russia as a protest against

the recent Soviet invasion of Afghanistan. Pursuant to the conditions and terms of the agreement, McGrath served a demand for arbitration on the Union on Friday afternoon, February 8, 1980. The demand indicated that McGrath sought arbitration of the alleged breach of the agreement by the refusal of the Union to provide labor for the ship AENEAS. On Monday, February 11, 1980, the Union notified McGrath that it refused to arbitrate.

McGrath's petition requests the court to compel arbitration and to enjoin and restrain the union in refusing to service the AENEAS as any other vessel carrying cargo to and from the Soviet Union.

A

Jurisdiction on this Court is conferred by Title 29 U.S.C. § 185 and Title 28 U.S.C. § 1331. The motion to compel arbitration is made pursuant to the Federal Arbitration Act Title 9 U.S.C. paragraph 4.

It is McGrath's contention that the refusal of the Union to work the AENEAS is covered by Section 11 of the Agreement as a "dispute or controversy" which has arisen "as to interpretation or application of . . . the provisions of this agreemnt" which "shall be referred to an arbitration committee for adjustment or decision". McGrath further contends that the last sentence of paragraph 11 which provides that "pending such adjudication or decision the men shall continue to work" is in the nature of a no-strike clause and based thereon seeks injunctive relief pending arbitration. McGrath also contends that the language set forth in the body of the agreement (Pg. 1) as to the obligations of the Union representative that "he shall handle any dispute between the parties and resolve such disputes on the pier level, he shall present them for arbi-

tration through the arbitration and grievance machinery, and see that there is no stoppage of work" is further basis for the relief sought herein.

McGrath concedes that the Union's decision to refuse to load grain bound for Russia, as a means of expressing its displeasure with the Soviet aggression in Afghanistan, is not in the nature of a dispute with management over the terms and conditions of the agreement, but contends that the Union's manner of implementation of the decision, i.e., the stoppage of work in order to carry out that decision, does involve a 'ispute covered by the agreement. McGrath says that the right of management to compel the Union to work as against the right of the Union to refuse work is a dispute and as such is subject to arbitration.

The Union concedes that it is bound under the terms of the agreement to arbitrate a dispute between McGrath and itself as to the terms or conditions of the contract, but contends that there is no dispute with McGrath herein but rather with the Soviets and that that dispute is not arbitrable. It asserts that what we have here are two disputes—the first, and the basis for its refusal to work, is its disagreement with the Russian aggression; the second, its disagreement with McGrath over its right to so refuse.

B

It has, of course, been affirmatively established that the arbitration of labor disputes is highly favored. In *United States Steel Workers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), the Supreme Court articulated the desirability of the arbitration of differences between labor and management:

> The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of provision for arbitration of grievances in the collective bargaining agreement. . . . Here arbitration is the substitute for industrial strife . . . arbitration of labor disputes under the collective bargaining agreements is part and parcel of the collective bargaining process itself . . . 363 U.S. at 578 (citations omitted).

The Court went on to discuss the processes afforded by the Labor Law when it stated:

> The Congress, however, has by Section 301 of the Labor Management Relations Act, assigned the Courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to an arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under Section 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582-583.

In *United Steel Workers* the Court further observed that the question of arbitrability is for the courts to decide.[1]

The question here, therefore, is whether there is a dispute covered by the agreement which should be submitted to arbitration pursuant to the terms of the agreement. When a dispute is not one which the parties agree to arbitrate, there can be no requirement to arbitrate and no injunction. *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, 380, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974).[2]

C

There are two disputes here, one with the Russians—the basis of the Union's refusal to work; the other with management over the Union's right to refuse to work. It is clear that the parties to this labor-management contract did not agree to arbitrate the former. Did they agree to arbitrate the latter?

The Union concedes that if there was a broad no-strike clause in the contract, then its right to strike to enforce its position on the first (Russian) dispute would be subject to arbitration, but in the absence of such a clause, the Union claims it is not subject to arbitration.

It claims these distinctions were set forth and recognized by the Supreme Court of the United States in *Buffalo*

---

[1] "Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose." 363 U.S. 583, Footnote 7.

[2] "No obligation to arbitrate a labor dispute arises solely by operation of law. The law requires a party to submit his grievance to arbitration only if he has contracted to do so." 414 U.S. 368, 373.

Forge Co. v. *United Steel Workers of America, AFL-CIO*, 428 U.S. 397, 96 S.Ct. 3141 (1976), wherein the Court observed:

> ". . . the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it was subject to the settlement procedures provided by the contract between the employer and the respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain. Thus had the contract not contained a no-strike clause or had the clause expressly excluded sympathy strikes, there would have been no possible basis for implying from the existence of an arbitration clause a promise not to strike that could have been violated by the sympathy strike in this case." (citation omitted) 428 U.S. at 407, 408.

It should be noted that in *Buffalo Forge* the agreement contained a "no-strike clause" and the Supreme Court held that the issue of whether or not that clause covered a sympathy strike was arbitrable, that is, whether or not the broad no-strike clause covered any and all stoppage of work whether related to disputes with management or not. Insofar as the underlying dispute, the Supreme Court adopted the reasoning and decision of the Second Circuit and found that it was not arbitrable. The Second Circuit had held "the strike at issue in the instant case is not over a grievance with *Buffalo Forge*, but instead is simply a manifestation of the striking workers deference to other

employees' picket lines." (517 F.2d 1207 at 1210, 2d Cir. 1975), and further observed:

> a strike not seeking to pressure the employer to yield on a disputed issue is not an attempt to circumvent arbitration machinery established by collective bargaining agreement. Accordingly, it does no violence to the federal pro-arbitration policy to require federal courts to refrain from enjoining such strikes. *Buffalo Forge Co., supra,* 428 U.S. at p. 1211 (citations omitted).

In this the Court of Appeals affirmed the District Court, which had refused to issue an injunction precisely because the underlying dispute was not arbitrable. *Buffalo Forge Co.* v. *United States Steel Workers of America, AFL-CIO,* 386 F.Supp. 405 (W.D.N.Y. 1974).

D

McGrath alleges, in connection with the ILA's nationwide refusal to load grain ships for Russia as a protest against the Soviet invasion of Afghanistan, that similar disputes in the Ports of Houston, New Orleans, Jacksonville, Norfolk and Philadelphia have been submitted to arbitration and that arbitrators in those cases have unanimously found against the Union, and that other District Courts have uniformly issued restraining orders preventing work stoppage. Two District Court cases have been brought to this Court's attention, i.e., *Jacksonville Bulk Terminals, Inc.* v. *ILA* (M.D. Fla., Jacksonville Div., Docket No. 80-81-CV-J-B); and *New Orleans Steamship Association* v. *General Longshoreworkers,* (W.D. La. Docket No. 80-0335). However, it appears that the Labor-Management Agreement in both those cases contained

separate and distinct no-strike clauses. In the Jacksonville case the no-strike clause provided:

> During the term of this agreement, the employer agrees that there shall be no lockout of the members of the Union, and Union agrees that there shall not be any strike of any kind whatsoever, walkout, suspension of work, curtailment, or limitation of production, slow down, or any other interruption or stoppage, total or partial, of the employers' operation for any cause whatsoever. . . . Paragraph 15(b)

In the *New Orleans* case the no-strike clause read:

> (a) No strikes, no lockouts—there will be no strikes, work stoppages or shall there be any lockouts.

The Court in *New Orleans* granted a preliminary injunction against the Longshoremen's Locals preventing any work stoppage in connection with the loading or unloading of grain destined for the Soviet Union. Judge Wicker in her opinion states:

> The Unions contend that the no-strike provisions of the collective bargaining agreements do not forbid work stoppage of a political nature. And since no dispute exists between the employer and the unions, the arbitrators exceeded their authority in ordering the defendant unions to load cargo bound for Russia.
>
> This Court decides otherwise. The collective bargaining agreements in this case contain identical and unequivocal no-strike and no-work stoppage clauses. There are no exceptions to this provision.

The difference between the collective bargaining agreements in the *New Orleans* and *Jacksonville* cases and the

one now before this Court is obvious. In each case, the agreement contained an independent promise by the Union not to strike. The promise was not tied to any pending arbitration. In *Jacksonville* it was for "the term of the agreement"; in *New Orleans*, it was unqualified: "there will be no strikes"; in *Buffalo Forge* it was equally unconditional "there shall be no strikes, etc."

It is significant that the Union agreement in the instant case is not in the form of a separate no-strike clause promising not to interrupt or refuse to work under any and all circumstances, but is an agreement to continue to work once a matter involving interpretation or application of the provisions of the agreement is referred to arbitration for adjustment or decision.

E

A Union can be compelled to arbitrate and be enjoined from striking only because it has agreed to settle its disputes by the former method rather than by the latter. *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed. 2d 199 (1970). The relief is in the nature of specific performance of a promise to arbitrate rather than to strike. However, where, as in the instant case, there has been no such promise, the Court cannot impose these remedies.

Here, the only promise not to strike is expressly while arbitration is pending. If there is nothing to be arbitrated, there is no obligation not to strike. The collective bargaining agreement in the case at bar does not contain any broad, independent no-strike provision whereby the Union has committed itself generally not to strike during the life of the agreement. Rather, the contract provides only that there will be no work stoppages "while such disputes are being arbitrated".

As in *Buffalo Forge*, the grievance by the Union—the Afghanistan invasion—is clearly not within the arbitration clause. To hold that the employer itself could, by simply claiming that the no-strike clause was being violated, create an arbitrable dispute, thus, triggering the no-strike clause would be circular reasoning. As the Second Circuit said in *Buffalo Forge* "if a strike not seeking redress of any grievance is enjoinable, then the policy of Norris-LaGuardia is virtually obliterated." 517 F.2d at 1211. And as the Fifth Circuit observed in *Amstar Corp.* v. *Amalgamated Meat Cutters and Butcher Workmen of North American AFL-CIO*, 468 F.2d 1372 (5th Cir. 1972): "it would be difficult to conceive of any strike which could not be enjoined." 468 F.2d at 1373.

The great difference between the case at bar and similar litigation involving similar sympathy strikes, including other litigation involving the ILA's refusal to service ships bound for the Soviet Union, lies in the collective bargaining agreements themselves. Unlike the situation in other cases, there is here no independent promise by the Union not to strike. There is only a promise to continue work while arbitration is pending, which presupposes an underlying arbitrable issue.

The contract in this case does not contain an unconditional promise not to strike for the term of the agreement. The Union promises only to continue work while arbitration is pending. There is here no underlying dispute as to which arbitration applies. The petition to compel arbitration is denied as is the request for injunctive relief.

IT IS SO ORDERED.

NEAL P. MCCURN
Neal P. McCurn
U.S. District Judge

Dated: March 6, 1980
Syracuse, New York